

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Diane Zitnick Caulder,

Debtors.

Diane Zitnick Caulder,

Plaintiff,

v.

Educational Credit Management Corporation
and USA Group Loan Services, Inc.,

Defendant.

C/A No. 98-06808-W

Adv. Pro. No. 98-80273-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the debt to USA Group Loan Services, Inc. and the Educational Credit Management Corporation is not excepted from discharge pursuant to 11 U.S.C. § 523(a)(8).

Columbia, South Carolina,
April 2, 1999.


UNITED STATES BANKRUPTCY JUDGE

FILED

at O'clock & min M

APR 02 1999

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (3)

ENTERED

APR 06 1999

V. L. D.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

APR 6 1999

Cauthen, Gorman, Burgess, Jgmt Index
~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

VANNA L. DANIEL

Deputy Clerk

UNITED STATES BANKRUPTCY COURT
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ORDER

Chapter 7

THIS MATTER comes before the Court upon a Complaint filed by the Debtor seeking to discharge a debt in the amount of approximately \$41,000 owed to the USA Group Loan Services, Inc. and/or Educational Credit Management Corporation¹ ("ECMC") pursuant to 11 U.S.C. § 523(a)(8).² Based upon the evidence and testimony presented, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On August 5, 1998, the Debtor/Plaintiff, Diane Zitnick Caulder ("Ms. Caulder") filed

¹ The original Defendant was USA Group Loan Services, Inc.; however, upon stipulation of the Plaintiff, the Defendant Educational Credit Management Corporation was substituted as the party Defendant based upon an assignment of the debt.

² Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

a voluntary Chapter 7 petition. Listed as one of the debts in her schedules and statements was a student loan in the amount of \$41,832.00 owed to USA Group Loan Services, Inc. On November 19, 1998, Ms. Caulder filed this adversary proceeding seeking to discharge the student loan debt as an undue hardship.

Ms. Caulder served the Summons and Complaint on the original defendant, USA Group Loan Services, Inc. on November 30, 1998. USA Group Loan Services, Inc. did not file a timely Answer to the Summons and Complaint and on February 16, 1999, counsel for Ms. Caulder filed an affidavit of no objection to the relief requested in his Complaint and asked for the entry of a default judgment.

Because the Debtor sought an affirmative finding by the Court in her Complaint that the repayment of the student loan constituted an undue hardship, the Court scheduled her motion for default judgment for a hearing.

On March 10, 1999, ECMC filed an application to be substituted as the real party in interest based upon an assignment of the student loan from USA Group Loan Services, Inc. ECMC also filed a request to be heard regarding the late filing of the response to Ms. Caulder's Complaint seeking declaratory judgment. Neither the USA Group Loan Services, Inc. or ECMC filed an Answer or responsive pleading within thirty (30) days as required by the Summons.

On March 30, 1999, this Court conducted a hearing on the merits of Ms. Caulder's Complaint at which time counsel for Ms. Caulder consented to the substitution of ECMC for USA Group Loan Services, Inc. While reserving the issue of Ms. Caulder's request for a

default judgment, the Court did allow ECMC to participate in the hearing, conduct expedited discovery including the deposition of Ms. Caulder, cross-examine the witnesses and to produce its own evidence.

Ms. Caulder is 41 years old and has a 13 year old daughter. Ms. Caulder has been divorced since 1987 and she and her daughter live with Ms. Caulder's parents. She testified that she works for the South Carolina Law Enforcement Division and her net take home income is \$681.00 paid twice a month. She testified that she is not able to pay rent to her parents or other expenses necessary to support herself and her daughter and that in previous years, her parents have claimed her and her daughter as dependents on their tax returns. She also testified that she does not own a car but borrows her father's car and pays for all of its expenses.

Ms. Caulder and her daughter have had and continue to suffer from numerous health problems dating back to 1985. She has severe migraines and numbness in her limbs which her physicians now believe may be attributable to Multiple Sclerosis. She also testified that she is under psychiatric treatment for a bi-polar disorder.

Ms. Caulder's daughter also has numerous health problems including a problem with her thyroid, sinus infections, migraine headaches and has a problem with her wrist. Both Ms. Caulder and her daughter require a large number of prescription and non-prescription medication.

Ms. Caulder is divorced and while her ex-husband does not pay alimony, he does pay \$300.00 per month in child support. While her ex-husband pays for their daughter's health insurance and is liable for half of the daughter's medical expenses that are not covered by insurance, he does not always pay his share of medical bills leaving Ms. Caulder with the entire expense.

The parties agree that Ms. Caulder has tried to make payments on the student loans in the past but that she has not been able to make any payment since 1994 when she consolidated her student loan debts. Ms. Caulder asserts that the overwhelming nature of her medical expenses, including insurance deductibles and co-payment requirements on insured illnesses, some uninsured medical expenses, and expenses in which her ex-husband does not pay his share or retains any insurance reimbursement, prohibits her from meeting her everyday living expenses and therefore precludes her from making any payments on her student loan debt. She also testified that while she does have a college degree in criminal justice, she did not foresee advancement in her job or any significant increase in her salary.

CONCLUSIONS OF LAW

Section 523(a)(8) of the Bankruptcy Code excepts certain educational loans from discharge. Section 523(a)(8) provides in full as follows:

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt- . . .
 - (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8). However, as stated in § 523(a)(8), if the repayment of the student loan debt constitutes an undue hardship, the debt will not be excepted from discharge. The leading case in this district on undue hardships is In re Ammerati 187 B.R. 902 (D.S.C. 1995) aff'd at 85

F.3d 615.

In Ammerati the District Court adopted the three-part Brunner v. New York State Higher Educ. Services Corp., 831 F.2d 395 (2nd Cir. 1987) standard to determine whether a debtor has demonstrated that failure to discharge his student loans would constitute an undue hardship under § 523(a)(8)(B) of the Bankruptcy Code. In Brunner, the Second Circuit held that in order to justify an undue-hardship discharge, the debtor must demonstrate: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependants if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

While it is the creditor's initial burden of proof to establish the existence of the debt and that the debt is owed to or insured or guaranteed by a governmental agency or a nonprofit institution of higher learning, it is a debtor's burden to show that excepting the debt from discharge will cause undue hardship. In re Raymond, 169 B.R. 67,69 (Bkrcty. W.D.Wash. 1994); In re Phillips, 161 B.R. 945 (Bkrcty. N.D.Oh. 1993); In re Dresser, 33 B.R. 63 (Bkrcty. D.Me. 1983); In re Fitzgerald, 40 B.R. 528 (Bkrcty. E.D.Pa. 1984); In re Dorman, 25 B.R. 545 (Bkrcty. S.D.Cal. 1982). Compare, In re Fox, 163 B.R. 975 (Bkrcty. M.D.Pa. 1993)(Debtor must first come forward with evidence of undue hardship, but creditor has ultimate burden of proving undue hardship is not present).

In this case, based upon the evidence presented and considering the factors set forth in Ammerati, it is the finding of the Court that the repayment of the student loan debt will cause an

undue hardship on Ms. Caulder and her daughter.³ Therefore for all of these reasons, it is

ORDERED, that the debt to USA Group Loan Services, Inc. and the Educational Credit Management Corporation is not excepted from discharge pursuant to 11 U.S.C. § 523(a)(8).

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
April 2, 1999.

³ Additionally, while the Court did allow ECMC to participate in the hearing on the merits, ECMC as well as USA Group Loan Services, Inc. are in default and the Court declines to find good cause to set such default aside.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
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VANNA L. DANIEL

Deputy Clerk